No. 12070.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MYRON E. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

No. 12071.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

SUPPLEMENTAL BRIEF OF APPELLEE.

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SUPPLEMENTAL BRIEF OF APPELLEE.

Following submission of this case on November 18, 1949, the appellants from time to time have sent to the Clerk of the Court letters containing the citation of cases wherein employees have been allowed overtime compensation notwithstanding the Portal Act. Appellants in no instance have limited themselves simply to citing the deci-

sion or decisions to which they wished to call the Court's attention, but in each letter have attempted some reargument of the case. The propriety of this may be seriously doubted. Were it to be commonly indulged in, it is obvious that the other party could reply with equally argumentative letters, and the Court in finally considering the case would find itself confronted not only with the task of considering the briefs of the respective parties but with a miscellaneous mass of argumentative correspondence.

In the instant case, the inapplicability to the question here involved of each case cited seemed to us apparent on the face of the case and the forwarding letter.

We assume the order permitting the filing of supplemental briefs by the parties was for the purpose of having the additional cases cited by the appellants presented in a convenient form for consideration by the Court and also to furnish appellee an opportunity to comment on them.

Except for these considerations there is really no need of supplemental briefs as we are satisfied that the contentions of both parties have been fully set forth in the briefs on file.

We are filing this supplemental brief only because the appellants are filing one in which we assume they will set forth the cases they have cited in their numerous letters, and we do not desire by not commenting on them to apparently concede their applicability to the instant appeals. Also, we shall take advantage of a supplemental brief to present to the Court decisions since submission of this

case which sustain our position. One of them, *Galvin, et al., v. National Biscuit Co.,* 82 Fed. Supp. 535, 537, approved by the Second Circuit Court of Appeals, we think quite conclusive.

We shall attempt as far as possible to avoid repetition of the arguments advanced in our opening brief, although as that brief fully sets forth the appellee's contention, in one sense it will be impossible not to reargue the principles there relied upon.

We shall refer to the appellant's opening brief by the letters "O. B."; to our main brief as "A. B."; to appellants' reply brief as "Ap. R. B.". We shall refer to the record and our appendix and to the Fair Labor Standards Act in the same way as in our brief.

By the expression "established by the appellants", we shall mean facts averred in their pleadings and/or set forth in their various affidavits, answers to interrogatories, and the uncontroverted testimony set out in their depositions.

I.

The Decision in This Case Involves the Determination of but One Single Proposition of Law and the Facts Material to That Decision Are Not in Dispute.

Our opening brief contains a detailed statement of facts, showing those upon which there is no dispute and those upon which the parties do not agree. We believe in the last analysis that appellants' principal basis for urging a reversal is that where there are material issues of fact upon which there is a dispute between the parties a summary judgment cannot be granted nor can it be granted where different material inferences can reasonably be drawn therefrom. *This we concede.*

However, in our opening brief we pointed out that the court below dismissed the cases *because jurisdiction not only did not affirmatively appear but, on the contrary, was affirmatively shown to be lacking.*

We have no reply from the appellants to the point which we made in our brief—which they could not of course answer—that it is established that a party who invokes the jurisdiction of a federal court has the burden at all times of showing the existence of such jurisdiction.

With reference to that burden, we concede that where there is a dispute as to the facts necessary to confer jurisdiction and those alleged or claimed by the plaintiff to be established by the record, which if proved on a trial on the merits, would establish such jurisdiction, that the case cannot be summarily dismissed. We concede further that there are facts upon which there is a dispute, *but we assert again that the disputed issues are entirely immaterial to the question of the Court's jurisdiction.*

There is no question that under the original Act the District Court had jurisdiction of the actions, and for the purposes of these appeals it may be conceded that the disputed issues of fact would under that Act have been material as to the right of recovery, but they became immaterial to the question of both recovery and the Court's jurisdiction after the amendment of the Act by the Portal Act, *and the undisputed facts which are established by the appellants affirmatively show the Court was without jurisdiction of the subject matter of the action.*

Aside from a few primary servicemen, all of the appellants were what is denominated "resident employees." They were required five nights a week* to live upon the appellee's premises so as to be able to respond to an emergency.

There is no dispute that the primary servicemen were employed upon a definite eight hour shift, at the end of which they could return to their own homes, which were not upon the Company's property. The appellee claims that at the end of their shift they were free to do anything they pleased except that if they did not go home, or after going there left their homes, they must leave with their switching center the telephone number where they could be reached in case their services were needed for an emergency. One or two of them concede that this is true; others claim they were required for five nights a week to remain in their homes to answer telephone calls or to be available for emergency service. All of them

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*The Court will recall when Southern California was upon a 48-hour week all of the resident employees were required to live upon the premises six days a week, but for these six days they were paid eight hours of overtime. We shall not lengthen the brief by referring to this wartime period.

concede they were paid time and a half for any work performed after their normal working hours or shift.

On pages 14-17 of our brief we discussed the primary servicemen, pointing out that the appellants had not mentioned them and that in no event could the judgments be reversed as to them. In the appellants' reply brief we find no answer to our contention as to the primary servicemen and, as we recollect, their oral argument was also limited to the right of the resident employees to recover overtime for the sixteen hours a day they remained upon the appellee's premises so as to be available if called on for emergency service. Neither do appellants make any reference to the primary servicemen in any of their subsequent letters to the Court. In any event, it is certain that the primary servicemen are in no more favorable position than the resident employees; hence, we will discuss only the appeals as applicable to those appellants.

Our main brief (A. B. 5-10) contains a detailed statement of the facts setting out clearly the factual differences between the various groups of resident employees, which we believe we showed were entirely immaterial to the questions of law involved in these appeals.

It would seem both unnecessary as well as inappropriate to attempt a repetition of the factual statement. A summary, however, of the main undisputed factual situation may not be inappropriate.

We attach as an appendix, under the heading "Statement of Facts Established by Appellants," excerpts from

appellants' complaint, the affidavits of the appellants, their answers to interrogatories, and their depositions, showing that our following summary of the factual situation, which divested the district court of jurisdiction, is shown by the appellants themselves, without reference to the facts shown by appellee.

Undisputed Controlling Factual Situation.

All the resident employees were employed either at substations, hydro stations or head gates and each and all were employed to render certain definite services. These services were to be performed during the daylight hours and between the time of the first designated telephone call in the morning to the switching center and the last required call to the switching center at night. This time was usually between 8:00 a. m. and 5:00 p. m., or 7:30 a. m. and 4:30 p. m., with an hour off for lunch.

We believe the correct designation of the period of time between the first and last call to the switching center would be "normal hours" or "normal working hours." Appellants contend, however, that this period of time was a definite eight-hour shift during which they were required to remain constantly on duty and could not, as appellee contends, leave their respective station houses. Hence, in referring to these normal working hours we shall occasionally, in conformity to appellants' contentions, refer to them as "shift" or "shift hours." By either of those terms or "normal working hours" we shall mean to designate the period between the first and last required calls to the switching center.

It was undisputed that each appellant made out his own time-card and that each and all always reported eight hours of work per day, whether they actually performed that amount or less, but if on any day they performed more than eight hours' services they reported that as "overtime." We again point to the uncontroverted testimony of appellant Wert.

> "A. We put down the date and what we were doing. * * *
>
> Q. *Eight hours?* A. *Yes.*
>
> Q. You put that down regardless of whether you worked more or less than that time, do you? A. Oh, no. *If we work more than eight hours, why, then, we put in for overtime for that.* That goes in a different section of the time sheet." [Wert Dep., pp. 8-10, lines 26-9; Ap. 70-71.]

(This is printed in both our brief and appendix.)

Further, if they were called on between shift hours to perform any services for the company they were paid overtime for the time spent therein, overtime in all cases being computed as though their salaries were applicable to forty hours of work per week.

The main factual dispute was that the appellee claimed that within normal working hours, appellants had no specified time for performing any of their services and that their actual duties, that is, the active services which they were employed to perform, required only a fraction of their normal working hours, and that in the time when they were not actively engaged they could do anything they

pleased, leaving their respective station houses or places of employment and spending their time with their families or in other vocations. The appellants, on the contrary, contend this is not true; that they were employed upon a definite eight hour shift during which they were not at liberty to return to their houses or engage in personal pursuits, but required to remain in constant attendance at their respective station houses or places of work; that at the end of their shift they could return to their houses but could not leave defendant's premises but must hold themselves ready to respond to emergency calls. It is appellants' contention that their salary was paid them for this definite eight-hour shift, and that while they concede they were paid overtime for any emergency services performed between shifts, they were entitled to their overtime payment for the sixteen hours a day which they spent living upon defendant's premises.

Under the original Act, prior to its amendment by the Portal Act, the dispute as to whether appellants during the period which we have denominated "normal working hours" were not at liberty to leave their stations and were generally fully occupied in the performance of their duties, or whether, as appellee claims, only a few hours of that time were consumed in active duties and when not so engaged they were at liberty to leave their stations and do what they pleased, would have been a material issue.

No one connected with the appellee thought that it could be summarily determined upon a motion or otherwise than upon a trial on the merits. But we do not believe that

under the Portal Act it is at all material. While we are confident that upon a trial on the merits we could demonstrate beyond question the correctness of the appellee's contention, *we concede that on this appeal in determining the correctness of the court's decision this Court must assume, as did the court below, that the contentions of the appellants in this respect are correct and could be so established at a trial on the merits.*

Appellants claim that under the decisions of the Supreme Court in *Armour & Company v. Wantock, et al.,* 323 U. S. 126, 89 L. Ed. 118, and *Skidmore v. Swift & Company,* 323 U. S. 134, 89 L. Ed. 124, and the subsequent decisions, their being required to remain upon the appellee's premises constituted an employment restraint which entitled them to time and half; in other words, that while they were paid their salaries for the duties they performed for the Company in their eight-hour shift, they are entitled to time and a half for the remaining sixteen hours of the day in which they lived upon the company's premises waiting to be employed in the event of an emergency. As pointed out in our opening brief, while there was no question that on occasions appellants were called out several times a night, the records of the call-out times of all the resident employees showed, without being controverted, that over the period of a year, the average of the call-out times was only one for every 15½ days.

The one and only question involved in this case is: *Under the Portal Act are the appellants entitled to recover for the time in which they lived upon the appellee's prem-*

ises waiting to be employed in case their services were needed for an emergency?

Prior to *Armour & Company v. Wantock, et al.,* and *Skidmore v. Swift & Company, supra,* it had not occurred to anyone that the waiting time of these various classes of employees might be claimed to be compensable. As a result of the above decisions and others further extending them, culminating in *Anderson v. Mount Clemens Pottery Co.,* 328 U. S. 680, 90 L. Ed. 1515, the country became flooded with billions of dollars' worth of claims which threatened the bankruptcy of industry and the demolition of our entire financial structure. As we pointed out in our opening brief, it was in part to outlaw suits for this character of waiting time that the Portal Act was passed.

In the debates on the Conference Report which we set out in our brief (page 27) to which the appellants have not replied, because they cannot, it is shown that Congress had this exact situation in mind and expressly intended to bar recovery for them. (See 93 Cong. Rec. 4515 (May 1, 1947); Ap. 4-14.)

We have made this brief recapitulation of the undisputed factual situation and our contentions because with it in mind the inapplicability of the cases cited in appellants' numerous letters becomes self-apparent.

II.

Cases Cited by Appellants' Letters Since Submission of the Case.

In their various letters since the submission of the case appellants have cited the following cases:

Manosky v. Bethlehem-Hingham Shipyard, Inc., 177 F. 2d 529;

Knudsen v. Lee & Simmons, 89 Fed. Supp. 400;

Colby v. Klune, 178 F. 2d 872;

Tobin v. Alma Mills, 9 W. H. Cases 563;

Thompson v. Stock & Sons, Inc., 9 W. H. Cases 585.

An examination of the cases will show that apparently the only reason for their being called to the attention of the Court is that in them employees prevailed.

In the first case cited, *Manosky, et al., v. Bethlehem-Hingham Shipyard, Inc.* (1st Cir., Nov. 9, 1949), 177 F. 2d 529, the action was to recover overtime compensation. The District Court granted defendant's motion to dismiss and plaintiffs appealed.

The complaint alleged that plaintiffs, who were mechanics, worked in excess of forty hours per week without receiving any compensation therefor. While the action was pending, the Portal Act was passed and defendant moved to dismiss. Plaintiffs then amended the complaint to allege that the work was compensable by an express provision of a written or non-written contract or by custom and practice, all during the portions of the days with respect to which they were made so compensable within the meaning of Sections 2 (a) and (b) of the Portal Act. Defendant again successfully moved to dismiss on the

ground of (1) failure to state a claim, and (2) failure to state facts giving the court jurisdiction.

In reversing the judgment of the District Court, the Court of Appeals held that plaintiffs need not set forth the specific activities for which they sought overtime compensation nor the express provision of a contract or custom rendering such activities compensable. The court also pointed out that the complaint appeared to state a claim for excess hours put in by plaintiffs in their principal productive activity as mechanics, saying:

> "Reading the complaint in the case at bar, we find nothing to indicate that plaintiffs were seeking to recover overtime compensation for travel time to or from the place of performance of their principal activity as mechanics, or for activities, such as washing up or changing clothes, which are preliminary or postliminary to said principal activity. It strikes us that the plaintiffs have been trying all along to state a claim for statutory overtime compensation for excess hours put in by them in their principal productive activity as mechanics, which activity would certainly be compensable under the prevailing collective bargainings agreement. * * *"
>
> *Manosky v. Bethlehem-Hingham Shipyard, Inc.*, 177 F. 2d 529, 533, 534.

It is evident that the decision does not bear on the merits of the question involved in these appeals, but with the sufficiency of the complaint as showing the appellant employees to be within the exception of the Portal Act. While it is in conflict with a great number of cases cited in the appendix to our brief holding that it is necessary that a complaint show the precise services for which overtime is sought and that they were compensable either by express

provision of a contract or by custom or practice, if the cited decision were conceded to be correct it could afford the appellants no comfort.

The judgment of dismissal in the instant cases was not granted on the insufficiency of the complaint but because on the entire record it was established by the appellants as well as by appellee that for all the services performed between shifts they were paid overtime, and that the only basis upon which recovery was sought was for their living time upon defendant's premises. That recovery for such time was clearly intended to be outlawed by the Portal Act unless it was made compensable by a direct provision of a contract or by custom or practice, cannot be denied. The case cited contains no indication to the contrary.

In the second case cited, *Knudsen v. Lee & Simmons* (D. C. S. D. N. Y., Sept. 23, 1949), 89 Fed. Supp. 400 (rehearing denied), action was brought in 1943 against a lighterage firm to recover overtime pay and liquidated damages under the Act. After certain preliminary motions, rulings and appeals and after the passage of the Portal Act, defendant filed a supplemental answer setting up defenses under that Act. Among these defenses were (1) that the action was barred by Section 2(a) of the Portal Statute inasmuch as neither overtime nor any activity of plaintiff's was compensable according to custom, practice or by express contract, and (2) that for the same reason the court was without jurisdiction under Section 2(d).

The action was tried on the merits, and with respect to the claim that the overtime was not compensable by custom, practice or contract, the court stated that it was evident from the record that plaintiffs had worked over forty hours a week for numerous weeks during the period in

question. The court then held that on the record it was necessary to assume that the claim was for hours worked in regular employment at the behest of the employer, which of course would not be affected by the Portal Act. In this respect the court said:

> "Plaintiffs are not seeking payment for activities which were not thought compensable before the Anderson v. Mt. Clemens Pottery Co. (328 U. S. 680 [11 Labor Cases, Par. 51,233], 1946) decision. *It is these newly perceived claims which Section 2 sought to eliminate and not those based, as here, on working time which always heretofore had been paid for.* Michigan Window Cleaning Co. v. Martino, 173 F. (2d) 466 * * * 6th Cir. 1949."
>
> *Knudsen v. Lee & Simmons,* 89 Fed. Supp. 400, 406.

Comment on the inapplicability of the above case to the question involved in this case as to whether recovery can be had for the time spent in living on appellee's premises would seem unnecessary.

The third case cited, *Colby v. Klune, et al.* (2nd Cir., Dec. 27, 1949), 178 F. 2d 872, 873-4, does not involve the Fair Labor Standards Act. It was a stockholders' derivative action for secret profits. The appeal was from a summary judgment and was reversed upon the ground that there was a disputed issue of fact which should not have been resolved except on a trial on the merits, the court saying, in part:

> "* * *, *we think that the plaintiff should be allowed at a trial to produce oral testimony in open court (by examination or cross-examination of witnesses), or other evidence, relevant under the foregoing definition of officer.*"
>
> * * * * * * * *

> "The statements in defendants' affidavits certainly do not suffice, because their acceptance as proof depends on credibility; and—absent an unequivocal waiver of a trial on oral testimony—credibility ought not, when witnesses are available, be determined by mere paper affirmations or denials that inherently lack the important element of witness' demeanor. * * *"
>
> *Colby v. Klune,* 178 F. 2d 872, 873-4.

This decision would be applicable if the issues on which there was a controversy between the parties were at all material to the question of the court's jurisdiction of the subject matter of the actions. Since, as we have shown, the only factual issues on which there was any dispute were entirely immaterial to that question, the principle of the above case has no application. We have always conceded—and it would be unavailing if we had not—that where there is a substantial dispute on a material issue there must be a trial on the merits.

The purpose of a trial on the merits of a disputed factual issue is to afford the fullest opportunity to the parties to present all of the evidence available to them and to afford them and the court the opportunity of having the witnesses personally before the court, where their appearance can be obtained, and subject to cross-examination. In the instant case no trial on the merits, no matter how protracted, could change the basic factual situation established by both parties, viz., that regardless of whether the normal working or shift hours of the employees were fully occupied or only partially so, that between those hours they could indulge in any pursuit they saw fit, and performed no services for the appellee unless called on in the event of an emergency, in which event they were paid time and a half for their services, the

amount being computed on the basis of their salary paid for forty hours of work per week. No trial, however protracted, could change the basic fact that appellants were not paid anything but their salary except their overtime for emergency services; that they made out their own time-cards and did not claim any overtime for their living time which they spent upon appellee's premises waiting to be employed in case of an emergency. Since that factual situation divested the court below of jurisdiction, the judgments of dismissal must be affirmed.

The fourth case cited, *Tobin v. Alma Mills* (U. S. D. C. W. D. So. Carolina, Sept. 8, 1950), 9 W. H. Cases 563, is clearly inapplicable to the instant appeals.

As we interpret the appellants' transmitting letter, the case is cited as sustaining the proposition that employees can recover overtime for activities performed prior to the Portal Act during portions of the day in which they were not made compensable by contract, custom or practice. The decision does not so hold and it would be erroneous if it did. It deals entirely with services performed subsequent to the date of the Portal Act.

In the *Tobin* case the administrator in 1938 had obtained an injunction against defendant violating the act and in 1949 the defendant moved to vacate the judgment and the present action was then commenced by petition of plaintiff to have the defendant company held in contempt.

At the hearing on the petition defendant's employees testified that from 1946 to 1949 they came to work prior to their shift and performed clean-up activities (duties which they were supposed to perform on their regular shift) in order that their regular duties would be easier.

They expected no compensation. It was stipulated that there was no contract, custom or practice which provided for compensation for those pre-shift time services; the last sentence of the stipulation reading: "That applies for the period subsequent to May 27, 1947."

Defendant contended that this stipulation barred the contempt action on the ground that the pre-shift activities were not compensable by contract, custom or practice, relying upon Sections 2a and 4b of the act. The court rejected this contention and held that where "principal activities" are performed prior to the commencement of the regular shift the Portal Act does not apply, citing Title 29, Code of Federal Regulations, 1947 Supp. pages 4401 and 4413 (Sec. 790.8), relating to Section 4 of the Portal Act. That section unlike Section 2 (which governs violations prior to the date of the act) is specifically limited to "activities which are preliminary to or postliminary to said principal activity or activities." These regulations and also the portion of the President's message referred to in the opinion emphasized that "principal activities" include any work of consequence performed for the employer and that such work does not fall within the purview of the act excluding certain "preliminary" and "postliminary" activities.

As we interpret the decision, it was rendered with reference to services performed subsequent to the Portal Act. This must be so since the Court held that recovery for all services performed prior to 1948 was barred by the statute of limitations.

Thus the decision can have no application to a recovery sought for services performed prior to the Portal Act. It would be inappropriate to attempt to discuss whether the

decision (which was by a district court and therefore not binding on this Court) was correct as to services performed subsequent to the Act. That question is not involved in these appeals. Assuming for the sake of the argument, without so conceding, that as to services subsequent to the Act the decision is correct, it is inapplicable to the present situation for two separate reasons, the first of which is, that appellants seek recovery for on call time prior to the Act.

It is quite evident that Congress intended to make a difference between future services and past services. Otherwise there would have been no possible reason for treating those services in different sections of the act. The philosophy of Congress is quite apparent. As to future services it felt it would so clarify the act that there could be no possible ambiguity as to what services the employer would be liable for overtime compensation.

As to past services, Congress evidently thought that it was obviously unfair to require industry to pay overtime for services, regardless of their character, which neither industry nor labor had regarded as compensable and which had been required and rendered without any expectation of being paid for. Hence, in addition to the clear mandate of Section 2. that no act should be compensable that was not made so by an express provision of contract or by custom or practice, it added subsection (b) as follows:

> "(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable."

In the conference report, it is said with reference to that:

> "The conference agreement (section 2(b)) contains a provision not stated expressly in either bill, that an activity shall be considered as compensable under the above referred to contract provision or custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable. Under this provision, for example, if under the contract provision or custom or practice an activity was compensable only when engaged in between 8 and 5 o'clock but was not compensable when engaged in before 8 or after 5 o'clock, it will not be considered as a compensable activity when engaged in before 8 or after 5 o'clock. So also, if under the contract provision or custom or practice an activity was compensable when engaged in before 8 but was not compensable when engaged in after 5 o'clock, it will not be compensable under the bill as agreed to in conference when engaged in after 5 o'clock. So also, if under the contract provision or custom or practice an activity was compenable during a certain portion of the regular workday but was not compensable when engaged in during other hours of the regular workday, it will not be compensable under the bill as agreed to in conference when engaged in during such other hours."
>
> Conference Report No. 326 H. R., 80th Congress, 1st Session April 29, 1947, pages 9-10.

Hence, to hold that services performed before the Portal Act are compensable because they are of the same character as the principal activities of the employee, where the services are performed at a time in which they are not made compensable by the express provisions of a contract, or by custom or practice, is to disregard not

only the clear language of the statute but the manifest intent of Congress; to give the act the directly opposite construction from that intended and to perpetuate the very abuses which Congress intended to eliminate.

This is clearly pointed out by Judge Follmer in his opinion in *Welsh v. Dillner Transfer Co.* (W. D. Pa.), 9 W. H. Cases 502.

The second equally conclusive reason why the *Tobin* decision is not applicable to the instant appeal is that there is no logical similarity between the appellants' principal activities which were performed for the company during their normal working or shift hours and their 16 hours of living time upon its premises.

During the sixteen hours of living time they performed no active services for the Company whatever unless called upon to respond to an emergency.

During their normal working hours they performed various services in the way of care and inspection of equipment, oiling, etc., for which they were employed on a monthly salary based upon forty hours of work a week.

Appellants claim that their services occupied their entire time during their normal working hours, and that if there happened to be any leisure they could not employ it for personal pursuits, as they were required to still remain at their various stations. Certainly, assuming their claim is correct, their activities during their normal working hours have no resemblance to their waiting time during the sixteen hours which they could spend in their homes and with their families after their shift or normal working time.

Appellee, however, claims that their active duties took only a small fraction of their normal working hours, and

that the remainder of those normal working hours they could utilize as they pleased. Even if appellants were to concede this claim, and that their normal working hours or their shift time contained many hours in which they performed no services, their position would not be improved. The sixteen hours of living time between their shift hours or normal working hours were in that part of the day in which any activities on their part were not made compensable by contract, custom or practice. Indeed, the appellants' record shows that except for the overtime paid for emergency services between the normal work or shift hours they were paid nothing but their monthly salary *which was for a forty hour week,* and in making out their timecards appellants made no claim for overtime for those sixteen hours a day, claiming overtime only for answering emergency calls during those sixteen hours. Thus, it is certain not only that there was no showing that the sixteen hours' living time which they could spend in their homes and with their families was made compensable by contract, custom or practice, but it affirmatively appeared that the contract, custom and practice was that such living time *was not to be paid for.* That being so, any claim for compensation for their living time as standby time was barred clearly by the provisions of subsection (b) of Section 2.

That such is the effect of the section is clear not only from its unambiguous language but also from the report of the Conference upon its applicability. It is also perfectly certain that in writing subsection (b) into the statute, Congress had in mind claims of the precise character of those here advanced, and definitely intended to outlaw them. At the danger of undue repetition, we again quote the debate in the House upon this section as affecting claims of this character.

93 Cong. Rec. 4515 (May 1, 1947):

"Mr. Hinshaw. The gentleman remembers the cases known as the stand-by cases which were brought out before his committee in which certain employees might be called upon at some time not during their regular working time to perform some duty and that many suits for wages have been instituted under that type of claim. Is that provided for in the present bill?

"Mr. Walter. Yes; we feel that under the language of section 2(b) of this bill that type of arrangement is covered and that the employer is not liable.

"Mr. Hinshaw. The case I had in mind was one where there were certain persons who were left to guard electrical distribution stations where they were given a house and so forth and perhaps performed one or two labors per day and yet were paid on a monthly basis. Large suits were brought for time and a half for an additional 8 hours per day pursuant to the ruling of the court.

"Mr. Walter. We hope that we have met that situation and all of the situations that have been brought to our attention, because we had in mind that all of these portal-to-portal suits are in the nature of windfalls. None of the plaintiffs—and I say that advisedly—ever felt they were entitled to compensation for activities which are the basis of these suits. I think I should add to what I said about the defense of good faith."

Although the above is quoted on pages 27 and 28 of our opening brief, and again on pages 4 and 5 of our appendix, we have received no reply thereto or comment thereon by appellants either in their brief or at their oral argument. The reason is perfectly obvious—there is none.

Of course, nothing is better or more firmly settled than that the sole function of a court in construing a statute is to effectuate the legislative intent. As well stated by this Court:

> "It is our duty to look to the language employed and the legislative history and 'to construe the language so as to give effect to the intent of Congress.' * * *."
>
> *Northwestern Mutual Fire Ass'n v. Commissioner of Internal Revenue,* 181 F. 2d 133, 135.

See, to the same effect:

MacKenzie v. Hare, 239 U. S. 299, 308;

Bank v. Sherman, 101 U. S. 403, 406;

Matson Navigation Co. v. United States, 284 U. S. 352, 356;

United States v. Missouri Pacific Railroad Co., 278 U. S. 269, 278.

In the last case cited, the Supreme Court of the United States tersely observed:

> "Construction may not be substituted for legislation. * * *"
>
> *United States v. Missouri Pacific Railroad Co.,* 278 U. S. 269, 278.

> "As the words of the section are plain, we are not at liberty to add to or alter them to effect a purpose which does not appear on its face or from its legislative history * * *."
>
> *Matson Navigation Co. v. United States,* 284 U. S. 352, 356.

There is no case of which we are advised that holds that an activity performed prior to the portal act is com-

pensable when performed at a time that it is not made so by a direct provision of contract or custom, merely because it is the same or similar to the main activities of the employees. There is language in some of the decisions that may give some support to such contention, but not when considered with reference to the factual situation discussed. This is illustrated by the next and last case cited.

Thompson v. Stock & Sons, Inc. (D. C. Mich., 1950), 9 W. H. Cases 585. This case, as we read it, involved the question of whether the employees could recover for their lunch time. Defendant contended that under the Portal Act they could not recover for services performed during that time. To fully summarize the facts would be rather long and is unnecessary for succinctly the question was this: The employees were not permitted during their lunch hour to leave their machines and while eating lunch were required to perform their ordinary duties. Thus, in part, the Court said:

> "* * * It would serve no useful purpose here to set out the well-known provisions of the Act or its legislative history which followed Anderson, *et al.* v. Mt. Clements Pottery Co., 328 U. S. 680 [6 WH Cases 83]. The defendant's president and bookkeeper expressed accord with the position of the plaintiffs that the defendant company was by the contract of employment required to pay for all working time and overtime compensation for all hours worked in excess of the statutory maximum. The Court having found that these employees are basing their claims for compensation for the usual activities performed during all the time they were in their respective shifts and that the so-called lunch period was, in fact, working time covered by the contract of employment, the claims are not barred by the Portal-

to-Portal Act. The provisions of the Act were never intended to bar recovery under facts similar to those found in this case. Compare Central Missouri Telephone Co. v. Conwell, 170 F. 2d 641 [8 WH Cases 353]. See also Michigan Window Cleaning Co. v. Martino, *et al.* (6 Cir. 173 F. 2d 466 [8 WH Cases 639]; Smith *et al.* v. Cleveland Pneumatic Tool Co. (6 Cir.), 173 F. 2d 775 [8 WH Cases 750]."

Thompson v. Stock & Sons, Inc., 9 W. H. Cases 585, 587, 588.

The case is very similar factually and in principle to the case of *Biggs v. Joshua Hendy Corp.,* decided June 28, 1950, 183 F. 2d 515, 520. That was an action to recover overtime compensation for work performed during lunch periods. The trial court awarded recovery for each lunch period worked on the day shift, but denied recovery for the same on swing or graveyard shifts on the basis of certain premium payments not here material. Certain of the plaintiffs appealed and defendant cross-appealed, the latter urging, among other things (1) that the work was not compensable under any contract, and (2) that remaining on call did not constitute compensable work. This court rejected the contention, saying:

"Cross-appellants further contend that work performed by appellants during lunch periods cannot be the basis for recovery under the Fair Labor Standards Act by reason of §2 of the Portal-to-Portal Act, 29 U. S. C. A., §252, because such work is not made compensable by the express provision of a contract within the meaning of §2(a) (1). That section is directed against claims for compensation for activities, such as dressing for work, traveling within the plant to the job location, etc., which are different from the activities which comprise the regular, nor-

mal part of the employment. The section has no application where, as here, the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the workweek.

"Appellee's final contention on cross-appeal is that there is insufficient evidence to support the finding of the trial court that appellant Biggs worked during all of his lunch periods. We think the evidence sustains the finding. He was on call at all times and time thus spent was compensable under the Fair Labor Standards Act. Armour & Co. v. Wantock, 1944, 323 U. S. 126, 65 S. Ct. 165, 89 L. Ed. 118; Skidmore v. Swift & Co., 1944, 323 U. S. 134, 65 S. Ct. 161, 89 L. Ed. 124."

Biggs v. Joshua Hendy Corp., 183 F. 2d 515, 520.

We have never understood that such a literal interpretation should be given to the Portal Act as to enable the employer to require a continuous service of his employees' principal activities for more than forty hours a week and not pay them overtime for the excess by camouflaging it so that excess work was performed during the lunch hour or other apparent lay-off times.

Ordinarily it must be conceded that a lunch time is not compensable because an employee, whether required to remain on the premises, or otherwise, is free for whatever period it is,—half an hour to an hour,—not only to partake of his lunch but to do whatever else he pleases, but when during that lunch hour he is required to attend his regular principal activities, consuming his food as he can between the performance of such work, the lunch hour period, of course, should be compensable, and we believe that within the actual wording of the Act, as well as with-

in its spirit, the services performed therein are compensable within the time within which they are made so by the custom or contract of employment. Certainly where the employee is required to continue his main activities through his lunch hour, sandwiching his food between the performance of those duties, in both the letter and spirit of the Portal Act they should be considered as performed within a time made compensable by either contract or custom.

To illustrate: If an employee is employed principally to perform certain services between the hours of eight and five, with one hour out for lunch, those services, of whatever kind or nature they are, are made compensable by either contract or by custom or practice between the hours of eight and five, and if they are to be performed during an hour which is designated as a "lunch" hour but in which the employee is actually required to continue to perform his services, they are clearly rendered within the time for which contract, custom or practice makes them compensable. We believe that this is the principle underlying the decisions of the district and appellate courts in *Conwell v. Central Missouri Telephone Company.*

In the *Conwell* case, as pointed out in our opening brief, the telephone operators were required to be on continuous duty for eleven hours a day and were paid for eight. A portion of the time was called "sleeping time," in which they could leave their stools and lie down to sleep if they did not have to answer their switchboards, but they had to be at all times, even during the so-called sleeping hours, responsive to the switchboards, just the same as when on their so-called duty time. When they asked for an increase in wages, instead of giving them more money the Company simply cut down the so-called "sleeping time."

We submit there is no similarity between the *Conwell* and lunch hour situations and that requiring an employee after his normal hours of work or a definite eight-hour shift to live upon the premises so as to be available if his services became necessary in case of an emergency, in which event they were paid for the time given to answering that emergency.

The district court in the *Conwell* case pointed out the difference between the situation of the plaintiffs in that case and a telephone operator who was permitted after the end of her shift to go to her home where she could attend to her own duties but was occasionally required to answer telephone calls, pointing out that as to such a situation the time at her home was not compensable under the Portal Act where not made so by contract, custom or practice.

In the instant cases, the employees, whenever they perform any service outside shift hours, were paid overtime therefor. As we have so often pointed out, the sixteen hours a day during which the resident employees lived upon the appellee's premises with their families, pursuing any personal vocation they desired that they could engage in upon the premises, is clearly not performing services similar to their main activities. Again, we emphasize, that when their living hours were interrupted by performing such services because of an emergency they were paid overtime for those services.

Clearly their action is for their living time in which they were performing no services other than being available for call in case of an emergency. It is undeniable that the Portal Act was designed to render such activities non-compensable and to terminate all litigation therefor by depriving the court of jurisdiction of an action founded upon such services.

III.

Decisions Rendered Since the Submission of These Appeals Supporting Appellee's Contention.

Galvin, et al. v. National Biscuit Co. (U. S. D. C. N. Y., 1949), 82 Fed. Supp. 535, 536 (approved by the Second Circuit Court of Appeals), was an action for overtime compensation, defendant moving to dismiss for lack of jurisdiction or in the alternative for summary judgment, on the ground that the claim was barred by the Portal Act. Plaintiff relied upon the following allegations:

> "(1) From and after November 1, 1944, the union agreements here involved provided that, 'The parties have agreed that fifteen minutes per day constitutes the reasonable average time consumed by the employees in changing to and from working clothes and that such time shall be included in hours of work and compensated as such'. (2) More than 15 minutes per day is needed and is actually used for clothes-changing. (3) The quoted provision of the union agreement was intended to include all preliminary and postliminary activities, not only clothes-changing. (4) These activities required more than 15 minutes. (5) Both before and after Nov. 1, 1944, employees were regularly released from their productive activity five minutes earlier than the scheduled hour, during which time they engaged in postliminary activities such as washing. (6) These activities required more than 5 minutes."
>
> *Galvin, et al. v. National Biscuit Co.* (D. C. N. Y., 1949), 82 Fed. Supp. 535, 536.

The Court stated the questions thus presented as follows:

> "Assuming plaintiffs' allegations of fact to be true, two questions are presented:

"(1) where a postliminary activity was made compensable by custom but only when engaged in during a specified period of the shift—here the last five minutes—did the time spent in that activity outside of that period thereby become compensable?

"(2) where a preliminary or postliminary activity was by contract made compensable for a specified length of time (here 15 minutes for clothes-changing), did any time spent in that activity in excess of the specified length of time thereby become compensable?"

With respect to the first question, the Court, after quoting from Conference Report, H. R. Rep. No. 326, 80th Cong., 1st Session, April 29, 1947, to the effect that if under the contract provisions or custom or practice the activity was compensable only when engaged in between 8:00 and 5:00 o'clock but was not compensable before 8:00 or after 5:00 o'clock it will be not considered compensable when engaged in before 8:00 or after 5:00 o'clock, said (the italics are ours):

"In the light of the illustration contained in the Conference report, the first question here presented must be answered in the negative. Insofar as plaintiffs' claim is based on the allegation that both before and after the 1944 contract it was the custom to allow employees to suspend five minutes before the end of the shift for postliminary activities such as washing up, it is clearly proscribed by the statute."

With respect to the second question, the Court said:

"The statute was designed to relieve employers of the obligation to pay for time spent in so called portal-to-portal, non-productive activities which neither they nor their employees had theretofore considered by cus-

tom or contract to be compensable. I do not find in the Act the intention that a promise by the employer to pay for fifteen minutes of clothes-changing time, for which he would not be compelled by statute to pay, absent the promise, should impose liability for thirty minutes or more. Such a construction of the statute, if applied to post Portal-to-Portal Act activities (the relevant provisions of the Act are similar; compare 29 U.S.C.A. §252(b), (c) with 29 U.S.C.A. §254(c), (d) tends to remove preliminary and postliminary activities from the sphere of collective bargaining.

"I recognize that a certain literal difficulty remains. Neither contract nor custom can open an avenue of escape from the obligations imposed by the Fair Labor Standards Act, 29 U.S.C.A. §201 *et seq.* A contract may not validly dictate that eight hours work shall be calculated as seven hours. *But in the construction of the statute common sense is not outlawed.* At least with respect to the kind of activity which the Portal-to-Portal cases brought to the attention of Congress and which generated the Congressional will to enact §2 of the Portal-to-Portal Act (see 29 U.S.C.A. §251 and §254) it seems plausible that when Congress hinged liability on contract or custom it meant to say that employers and employees were free to contract or agree. * * *"

Galvin v. National Biscuit Co., 82 Fed. Supp. 535, 537.

The plaintiffs' appeal was dismissed because of their failure to file the record supporting the same within the time provided. However, in so doing, the appellate court went out of its way to approve the opinion of the court below, saying:

". . . We are satisfied that the plaintiffs have shown no merit in their claims. Accordingly the

appeal is dismissed because it involves no substantial question of law or fact for the reasons given by Judge Rifkind in Galvin v. National Biscuit Co., D. C., 82 F. Supp. 535."

Galvin v. National Biscuit Co. (2nd Cir. C. C. A.), 177 F. 2d 963, 964.

In *Bumpus v. Remington Arms Co., Inc.* (8th Cir., July 6, 1950), 183 F. 2d 507, in sustaining the dismissal of an action to recover for overtime activities because of lack of jurisdiction by virtue of the Portal Act, the Court said:

". . . we must assume that the definition of 'actual working time' is not affected by the time card situation. The assumption is necessary since appellant has the burden of clearly stating and proving herself within an exception of the Portal to Portal Act in order to sustain the Jurisdiction of the Court."

Bumpus v. Remington Arms Co., Inc., 183 F. 2d 507, 509, 510, 513.

In that case it was held that the written contract was so clear that the services for which overtime compensation were sought were not made compensable that it negatived any claim of custom or practice. In the instant cases, the custom and practice as shown by the appellants themselves of not receiving any overtime for the sixteen hours of living time which they could spend with their homes and with their families upon the appellee's premises negatives the fact that Bulletin A-36 was ever intended or understood as promising overtime except for actual services performed in answer to an emergency.

Indeed, it is clearly shown that it was the custom and practice from the inception of the employment of these

appellants and all other similar employees that they received a monthly salary for forty hours of work a week, and received *no other compensation* except overtime when they responded to an emergency call outside of their normal working hours. *In other words, the custom and practice was clear that there was no compensation for their living time.*

For the reasons heretofore set forth and set out in our brief we respectfully submit that the judgments in each case must be affirmed.

All of which is respectfully submitted.

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STATEMENT OF FACTS ESTABLISHED BY APPELLANTS.

(Ap. refers to Appendix of our Original Brief. All italics in quotations are ours.)

Pleading.

R. 107-8. Third Amended Complaint, Par. IV:

"That plaintiffs at all times mentioned in this action were employed by defendant under an express provision of an oral and written agreement in effect during all of the time of their employment; that pursuant to said agreement, *plaintiffs were employed at a stipulated monthly salary based on 40 hours of work each week* and were to receive in addition thereto, additional compensation at one and one-half times their regular hourly rate for all hours *worked* in excess of forty hours in each work week during the period covered by this action, *but did not receive the compensation required by the Acts,* although all of said work time and overtime was compensable under said agreement and said Acts." [R. 107-8, Third Amended Complaint, par. IV.]

Affidavits.

"The plaintiffs who were substation operators and attendants were required as a condition of their employment to live * * * on the premises * * * in houses rented from the defendant * * *." [R. 114, affidavit in support of motion for partial judgment.]

"* * * There were eight hours each day when the employees were required to take readings and stay at the substation proper on company duty. * * *" [R. 305, affidavit of plaintiff substation operators.]

"* * * *After eight hours the substation operators considered themselves free from routine duties but understood that they were still, for the balance of the 24-hour work day, in the employ of the defendant company.*" [R. 304, affidavit of substation operators.]

"With respect to the failure of the plaintiffs to place on their time records the remaining sixteen hours each day as overtime, affiants state that the defendant's officers and agents informed employees not to put down such time on the time record." [R. 305, affidavit of substation operators.)

"All of the plaintiffs who were primary service men were paid a semi-monthly salary which was computed on the basis of forty hours a week and it was agreed by defendant in its order A-36 that these plaintiffs would receive time and a half for all hours worked in excess of forty hours each work week, in addition

to their salary. * * * *defendant paid these plaintiffs only their salary and time and a half for the actual time consumed when called out for emergency service on stand-by time."* [R. 309-310, affidavit of primary service men.]

"The plaintiffs herein were paid for only forty hours per week together with the emergency callouts above referred to, except during the period of War Manpower Regulations when they received 8 hours overtime for the sixth day of work in the work week. *For the balance of the time spent in waiting for emergency callouts and in the performance of various routine duties such as turning on street lights, checking peak loads, resetting alarms, and answering telephones plaintiffs did not receive compensation . . .*" [R. 120, appellants' affidavit in support of motion for partial summary judgment.]

Interrogatories.

Defendant's Interrogatory No. 60 to Substation Operators and Attendants and Answer.

Interrogatory No. 60:

"From and after March 19, 1942, did plaintiffs or any of them receive any compensation other than their monthly or weekly salary for being required during five days a week (and six days a week when the Substation Division was operating upon a 48-hour week) to remain so near to the substation or their residence as to be able to hear and respond to an alarm bell in case their services were needed?" [R. 272.] Answer: "No." [R. 323.]

Answer of Hydro Appellants to Interrogatories.

"* * * generally the men were in the Hydro stations between 8:00 a. m. and 4:00 p. m. and thereafter were required to remain in and about the grounds or the home or relief quarters to answer calls and emergencies." [R. 313.]

"These plaintiffs were on a semi-monthly salary and did not receive any compensation other than the salary and time and a half for all hours reported by them in excess of forty hours per week; * * * *defendant instructed these plaintiffs not to put down on their time records more than eight hours per day and time spent on emergency call-outs.* * * *" [R. p. 311.]

Defendant's Interrogatory No. 19 to Primary Servicemen and Answer.

Interrogatory No. 19:

"Have the plaintiffs Paul W. Cockrell, J. D. Borden, A. L. Honnell and Clarence C. Prinslow, or any of them, ever made any demand, oral or written (other than bringing or joining in this suit), upon the defendant for the payment of any amount because of being required on certain days of the week, in case they did not go home (338) after the end of their shift, or after going home left their homes, to advise the switching center of a telephone number where they could be reached in case their services were needed in the event of an emergency?" [R. 263.]

Answer:

"No formal demand was made although the plaintiffs continually complained about the failure of the defendant to pay such overtime. *All of the plaintiffs were instructed not to turn in any record on their time cards, time sheets or other records, showing the standby time.*" [R. 321.]

Depositions.

(The following excerpts, which we believe highlight the factual situation outlined in the brief, are extracted from longer and more extensive quotations from appellants' depositions set forth in the Appendix to our main brief).

Substation Operators and Attendants

H. L. Anderson:

"Q. Do I understand that it is your estimate that on an average you spent eight hours a day in active work of that kind? A. That is right." (Dep. p. 9 lines 4/7, Ap. 35.)

* * * * * * * *

"A. I was paid a monthly wage, which was based on an hourly rate. That hourly rate was derived from the number of working days in the month, and that was computed in a 40-hour work week." (Dep. p. 10, lines 1/4, Ap. 36.)

* * * * * * * *

"Q. Did you normally spend your evenings with your family while you were at the substation? A. Did I?

Q. Yes. A. Yes." (Dep. p. 28, lines 12/16, Ap. 41.)

Cross-Examination (By Mr. Sokol)

"Q. Did you ever put down this stand-by time when you were waiting to do your work? A. *No, I did not.*

Q. Why not? A. *It wouldn't have been allowed to go through.*" (Dep. p. 33, lines 5/9, Ap. 42.)

EUGENE L. ELLINGFORD:

"Q. Did you make regular time reports while you were acting as a station attendant at Los Alamitos and Anita? A. What do you mean?

Q. Did you have any time record that you made out? A. Yes. We call in at 8:00 o'clock, and took readings from 8:00 to 12:00 and 2:00 to 6:00.

Q. Did you make any daily record for the report of your time worked? A. We had what we called daily time sheets at that time. In other words, it was made out each day.

Q. I see; and what did you show on that? A. *Eight hours a day.*" (Dep. pp. 14-15, lines 16/1, Ap. 51.)

"Q. Were you paid while you were at Los Alamitos and Anita, were you paid overtime for any work of any kind? A. *Emergency operating only.*" (Dep. p. 12, lines 20/22, Ap. 49.)

"Q. Did you ever put down your stand-by time after 6:00 o'clock, I mean, on this sheet? A. *No. They told me not to.*

Q. Who told you not to? A. *Every chief clerk of every division I have worked in. They said stand-by time was not allowed.*" (Emphasis added.) (Dep. p. 42, lines 15/20, Ap. 54.)

VERNON B. WERT:

"Q. Eight hours? A. Yes.

Q. You put that down regardless of whether you worked more or less than that time, do you? A. *Oh, no, if we work more than eight hours, why, then, we put in for overtime for that.* That goes in a dif-

ferent section of the time sheet." (Emphasis added.) (Dep. pp. 9-10, lines 24/4, Ap. 70.)

"Q. What if you work less than eight hours; what do you do then? A. *We put in eight hours.*" (Dep. p. 10, lines 7/9, Ap. 71.)

* * * * * * * *

"Q. In receiving your pay, then, you considered that you were receiving pay for eight hours a day? A. That is right." (Dep. p. 38, lines 20/22, Ap. 77.)

"Q. In computing the overtime that you were paid—you were paid some overtime; is that correct? A. Yes.

Q. In computing that, was that based upon an 8-hour day, five days a week when you were working five days a week? A. *Based on a 40-hour week, yes.*

Q. It was based on a 40-hour week? A. *Yes.*" (Dep. p. 41, lines 19/26, Ap. 78.)

"Q. Did you ever receive any pay for the stand-by time? A. Not as such." (Dep. p. 42, lines 17/18, Ap. 78.)

"Q. But at any time have you ever been paid anything outside of your regular monthly salary for being on call? A. *No; I never received anything for being on call.*" (Dep. p. 51, lines 12/14, Ap. 79.)

"Q. And that your monthly rate was broken down to give you an hourly rate based on 40 hours a week. Is that correct? A. Our monthly wage was broken down to show the hourly rate that we earned in that month, yes.

Q. Based upon 40 hours in the week? A. That is right.

Q. It was not based upon 24 hours in a day, was it? A. *It never has been.*

Q. It was based upon eight hours a day, five days a week, or 40 hours a week. Is that correct? A. That's correct." (Dep. pp. 54-55, lines 20/4, Ap. 80.)

Hydro Division Employees

Hydro Station Attendants

M. E. Roach:

"Q. What were your hours supposed to be? A. A. 7:30 to 4:30 with an hour for lunch.

* * * * * * * *

Q. Well, you are suing for a claim of overtime which you haven't been paid for. On what do you base that claim? A. *I call it standby time.*

Q. Well, tell me on what you base that. A. I was there on the property. I had to live on the property. I couldn't go and come as I pleased." (Dep. p. 8. lines 14/23, Ap. 81-82.)

"Q. When did they first start paying you any overtime? A. June of '41, I believe * * *

* * * * * * * *

Q. What did they pay overtime for? A. *For the time that you were called out.*

Q. After normal hours? A. *After 4:30 in the evening,* or *before 7:30 in the morning."* (Dep. p. 12, lines 4/15, Ap. 83.)

"Q. Now, since then you have been paid overtime for any active duty that you performed after 4:30; that is, while you were in this position? A. As far as I know, I was.

Q. Who kept your time sheets? A. I kept my own." (Dep. p. 13, lines 20/25, Ap. 83.)

"Q. Did your family live with you? A. Yes." (Dep. p. 15, lines 13/14, Ap. 84.)

"Q. After 4:30 you were at liberty to do anything you pleased with your family, so long as you didn't go beyond the hearing distance of the alarm. Is that correct? A. That is right." (Dep. p. 16, lines 4/7, Ap. 84.)

Clarence Rogers:

"Q. Now, you showed on that all the overtime that you performed? By that I mean any active duties beyond 7:30 and 4:30? A. Well, I wouldn't say all of it, because a lot of time, maybe, I'll go out for five or ten minutes, and I don't bother with it. So I don't know.

Q. Nobody told you not to bother with it, did they? A. No, they didn't." (Dep. p. 23, lines 6/13, Ap. 92.)

"Q. They paid all that you turned in? A. All that I ever put in." (Dep. p. 23, lines 25/26, Ap. 92.)

"Q. When you came to take it, what, if anything was said about it that you remember; the substance of what he said about the job? A. Well, he told

me that I would work a regular eight-hour day, but I would be stuck there 24 hours a day.

Q. What did he say, if anything, about overtime? A. *We would get overtime if I was called out after 4:30.*" (Dep. p. 25, lines 8/15, Ap. 93.)

"Q. And if you were called out after the eight hours, you would get overtime for the actual work? A. *That is right.*

Q. That is what you understood your compensation would be? A. *That's it.*" (Dep. p. 26, lines 7/12, Ap. 93.)

Headgate Tenders.

E. G. Eggers:

"Q. Is he the man that employed you for that job? A. Yes, sir.

* * * * * * * *

Q. Now, did he ever say anything to you about paying you any overtime? A. Yes, sir.

Q. What did he say about that? A. It would be time and one-half.

Q. For what? A. *When I was called out at night.*" (Dep. pp. 17-18, lines 2/4, Ap. 102.)

"Q. Oh, did you keep your own time? A. Yes, sir." (Dep. p. 22, lines 9/10, Ap. 103.)

"Q. Have you ever put in any claim for overtime that hasn't been allowed? A. No, sir." (Dep. p. 25, lines 1/3, Ap. 103.)

Cross-Examination (By Mr. Sokol)

"Q. Will you state whether or not to your knowledge your monthly salary is based upon eight hours of work a day, or 24 hours a day?

* * * * * * * *

The Witness: It is based on an eight-hour day." (Dep. p. 31, lines 7/12.)

F. E. Griffes:

"Q. Now, if you spend more than eight hours a day at that, you put that overtime in, don't you? A. Yes.

Q. And you get time and a half for it? A. Yes, sir." (Dep. p. 15, lines 1/5, Ap. 109.)

"Q. Now, these days that you don't walk the flume, when you are cutting brush, or lumber, about how many hours do you put in on that? A. *Eight hours.*" (Dep. p. 29, lines 11/14, Ap. 112.)

Cross-Examination (By Mr. Sokol, Plaintiffs' Counsel.)

"Q. By Mr. Sokol: But my question is: Do you regularly work from 7:30 a.m. to 4:30 p. m.? A. Yes, regularly.

Q. With an hour off for lunch? A. Yes.

Q. After that time where do you go; to your home? A. Yes." (Dep. p. 30, lines 18/24, Ap. 113.)

"Q. When do you get paid after your regular shift ends at 4:30 p. m.? When do you get paid for work after that time? A. *Whenever I am called out.*

Q. Called out from where? A. From home." (Dep. pp. 31-32, lines 23/1, Ap. 113.)

"Q. Did anyone tell you that the only time you would get paid overtime for was the time you actually did work after 4:30 p. m.? A. Yes." (Dep. p. 36, lines 23/26, Ap. 114.)

PRIMARY SERVICE MEN.

J. D. BORDEN:

"Q. You didn't understand, when you went to work, that you got any overtime for any standby unless you were called on to perform some actual service, did you? A. *No, sir; only for actual service called on.*" (Dep. p. 19, lines 23/26, Ap. 16.)

"Q. You received a salary of $225 a month, didn't you? A. That is right.

Q. And you understood that was all you were going to get unless you actually did something after your eight hours of work? A. Yes. I was given to understand that that would be all I would get unles I got overtime *which I would be called on for.*" (Dep. p. 20, lines 16/24, Ap. 16-17.)

"Q. Well, on your overtime sheet you put on all the actual services that you performed after eight hours? A. *That is right; yes.*

Q. And you got paid for all of them? A. *We got paid for all that was on that sheet, yes, all that I did.*" (Dep. pp. 21-22, lines 21/26, Ap. 17.)

W. H. Culbertson:

"Q. What instructions did you have about either staying at home or leaving telephone calls where you could be reached? A. You were always supposed to be reached by the telephone or they knew where you were at all the time." (Dep. p. 12, lines 9/13, Ap. 21-22.)

"Q. And if you went out of your own house, to leave word where they could reach you? A. All the time.

Q. I say is that the substance of what he told you? A. Yes." (Dep. p. 15, lines 3/7, Ap. 22.)

"Q. As I understand it, after 5:00 in the evening and before 8:00 in the morning you had nothing to do for the company except answer a call when you were called? A. *Whenever we were called on trouble, that is all.*" (Dep. p. 22, lines 1/4, Ap. 23-24.)

"Q. You never put down any overtime that you didn't get paid for, did you? A. No, sir.

Q. And insofar as you knew, you put down all of the overtime you did perform, didn't you? A. I tried to." (Dep. pp. 23-24, lines 26/5, Ap. 23.)

John M. Smith:

"Q. Then you were paid time and one-half for anything you actually did after your regular hours? A. Yes; when we were called out to work." (Dep. p. 14, lines 7/9, Ap. 31.)

"A. Yes; I made out my own time sheets.

Q. You put in for all your overtime as you figured it? That is, you figured it, didn't you? A. Yes.

Q. And you were paid for all of it? A. I was paid for all of it. I never turned in any that I didn't get paid for." (Dep. p. 15, lines 5/11, Ap. 31.)

"Q. Were you told at any time that you would not be compensated for the time that you were standing by waiting to answer those emergency calls? A. Well, I don't know as though I was told that when I took the job, but then everybody else had been doing the same way and, of course, I knew.

Q. *You mean that is the custom and practice in the company?* A. *That is the way they had been doing for years, at least ever since I've been there.*" (Emphasis added.) (Dep. p. 19, lines 12/21, Ap. 32.)

"Q. But you have been getting time and one-half for the time that you actually used in actual work on an emergency call? A. Yes." (Dep. pp. 19-20, lines 24/1, Ap. 32.)

"Q. *And so you never got any money for waiting?* A. *No.*" (Dep. p. 23, lines 2/3, Ap. 33.)

A. L. Honnell:

"Q. Well, have you had any instructions as to whether you should stay at home or if you went some place else leave your telephone number? A. Yes. If I want to go to Joe's house, providing he has a telephone, I in turn call the substation and notify them where I will be so in case they want to get hold of me they can." (Dep. p. 10, lines 6/12, Ap. 28.)

"Q. You have been paid fully according to the time sheets that you have turned in? A. Yes, sir." (Dep. p. 22, lines 10/12, Ap. 29.)

Cross-Examination

(By Mr. Sokol, plaintiffs' Counsel).

"Q. Well, were you told that you would receive compensation for that standby time? A. No, I wasn't told that I would receive any compensation.

Q. Were you told that you would only get paid for the times you left your home on duty? A. *The only time that we would get paid for is the time that we left our home to go on call and take care of whatever emergency trouble arose."* (Emphasis added.) (Dep. p. 25, lines 8/16, Ap. 29.)